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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 696

WILLIAM J. ALLISON,
Appellant

vs.

THE STATE OF INDIANA,
Appellant

STATEMENT AS TO JURISDICTION

WILLIAM C. ERBECKER
312 E. Washington Street
#212, 213, 214
Indianapolis, Indiana

Attorney for Appellant

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. .....

WILLIAM J. ALLISON,
Appellant

vs.

THE STATE OF INDIANA,
Appellee

STATEMENT AS TO JURISDICTION

In compliance with Rule 15 of the Supreme Court of the United States, William J. Allison, Appellant herein, submits herewith his statement, particularly disclosing the basis upon which the Supreme Court of the United States has Jurisdiction on Appeal to review the judgment of the Supreme Court of Indiana entered in this cause.

OPINION BELOW

The opinion of the Supreme Court of Indiana is reported in 166 N.E. (2d) page 171. (Opinion rendered April 18, 1960; rehearing denied May 23, 1960). The case is not yet reported in the Indiana Reports. The majority opinion of the Court is Appendix "A," attached hereto. The dissenting opinion is Appendix "B," attached hereto.

JURISDICTION

The appellant was convicted upon a trial by jury on two counts charging the misdemeanor of disorderly person while using the telephone under Acts 1957, ch. 61, par. 1, p. 114, being 10-1511, Burns' 1956 Replacement. The indictment in two counts was as follows:

> "The Grand Jury for the County of Marion in the State of Indiana, upon their oath do present that..... WILLIAM JOHN ALLISON alias WILLIAM THOMAS ALLISON .....
> .....
> on or about the 16th day of May, A.D. 1957 at and in the County of Marion and in the State of Indiana, did then and there unlawfully telephone another person, to-wit: BERNARD W. WYNN, and addressed the said BERNARD W. WYNN lewd, lascivious and indecent words or language, the exact description of which words and language are too lewd, lascivious and indecent to be set out herein or to encumber the records of this Court, then and there being contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana.
>
> /s/ JOHN G. TINDER
> Nineteenth Judicial Circuit
> Prosecuting Attorney

"Count Two:

The Grand Jurors aforesaid, upon their oaths aforesaid, do further say and charge that WILLIAM JOHN ALLISON alias WILLIAM THOMAS ALLISON on or about the 16th day of May, A.D. 1957, at and in the County of Marion and in the State of Indiana, did then and there unlawfully telephone another person, to-wit: BERNARD W. WYNN, repeatedly for the purpose of annoying, molesting and harrassing the said BERNARD W. WYNN or his family, then and there being.....
contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Indiana.

/s/ JOHN G. TINDER
Nineteenth Judicial Circuit
Prosecuting Attorney

A motion to quash was directed to both counts. It is urged that both counts of the indictment are bad for the reason that it does not set out verbatim the lewd and indecent words and language used over the telephone and that the language of the statute is not sufficiently specific.

The Judgment of the Supreme Court of Indiana was entered on the 18th day of April, 1960, and an order was entered on the 23rd day of May, 1960, denying a petition for rehearing; Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Court of Indiana on May 24, 1960.

The Jurisdiction of the Supreme Court of the United States to review this decision and judgment by direct appeal is conferred by Title 28, United States Code Annotated, Sec. 1257 (2).

Cases believed to sustain the jurisdiction of this Court are as follows:

(a) State statute involved is vague, uncertain and indefinite.

Winters vs. New York
333 US 507

Stomberg vs. California
283 US 359

Herndon vs. Lowry
301 US 242

(b) There must be an ascertainable standard of guilt.

Connelly vs. General Construction Co.
269 US 385

Pierce vs. United States
314 US 306

United States vs. L. Cohen Grocery
255 US 81

(c) State statutes must use words of determinative meaning.

United States vs. Resnick
299 US 207

Donnelly vs. United States
276 US 305

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Callaher vs. State
193 Ind. 629

Smithe vs. State
186 Ind. 252

Moore vs. State
183 Ind. 114

Hedderich vs. State
101 Ind. 564

5th Amendment to the United States Constitution

6th Amendment to the United States Constitution

Alford vs. United States
282 US 687
(Reversible error for the trial judge to refuse the defendant's counsel the right of cross-examination)

The text of the statute, namely, Indiana Statute, Acts of 1957, Chapter 61, page 114, being Burns 1959 Cumulative Supplement, Section 10-1511, reads as follows:

> "Annoying, molesting or harassing another or indecent language by telephone calls—Whoever telephones another person and addresses to or about such other person any lewd, lascivious or indecent words or language; or whoever telephones another person repeatedly for the purpose of annoying, molesting or harassing such other person, or his or her family, shall be deemed guilty of the misdemeanor of being a disorderly person, and, not exceeding five hundred dollars ($500.00), to which may be added imprisonment in the county jail not exceeding six (6) months. Provided, that any offenses committed by the use of a telephone as herein set out may be deemed to have been committed at either the place at which the telephone call or calls were made, or at the place where the telephone call or calls were received."

QUESTIONS PRESENTED

The questions presented in this appeal are as follows:

(a) The constitutionality and validity of the State's statute involved, which was hereinabove set out.

(b) The legal sufficiency of the indictment drawn under said statute, and the legal sufficiency of Count One and Count Two of said indictment drawn thereunder.

(c) The erroneous holding, ruling, decision and judgment of the majority opinion of the Indiana Supreme Court that Count One and Count Two of the indictment were sufficient, and the erroneous holding, ruling, decision and judgment of the major-

ity opinion of the Indiana Supreme Court affirming the action of the lower court in overruling and denying appellant's Motion to Quash Count One and Count Two of said indictment.

(d) DENIAL OF THE RIGHT OF CROSS-EXAMINATION OF STATE'S WITNESSES BY DEFENDANT.

(e) The 5th Assignment of Error, urged and raised by appellant in the Supreme Court of Indiana, which reads as follows:

"The trial court erred in overruling appellant's Motion for John L. Niblack to Disqualify Himself."

which said Verified Motion by appellant was supported by an affidavit of one of appellant's counsels in the Criminal Court of Marion County, Division No. 1, the trial court, which includes pages 24 through 38 of the transcript in said cause.

(f) PERMITTING TESTIMONY RELATIVE TO ALLEGED TELEPHONE CALLS WHICH OCCURRED PRIOR TO EFFECTIVE DATE OF SUCH STATUTE.

(g) Permitting testimony as to arrest and number thereof of a witness (defendant-appellant).

(h) Refusing appellant's counsel the right to cross-examine State's witnesses as to the conversations and place of residence.

(i) Refusing appellant's counsel the right to inquire and cross-examine as to the residence of the witness for the prosecution.

STATEMENT OF CASE

On May 23, 1957, the Grand Jury of Marion County, Indiana, returned an indictment against appellant William J. Allison in two counts charging the misdemeanor of disorderly person while using the telephone. The indictment, omitting the caption and formal parts, reads as follows, to-wit: (See Page 2, under heading "Jurisdiction")

Appellant Allison on July 8, 1957, filed his "Verified Motion of William T. Allison Requesting that the Honorable John L. Niblack Disqualify Himself from Serving as Judge in the Above Cause," and one of his attorneys at the time, Joseph Kivett, filed his affidavit in support thereof. The Court overruled and denied the Motion to disqualify himself, and appellant Allison on July 8, 1957, filed a Motion to Quash each cont of the indictment, which, omitting the caption and formal parts, reads as follows:

"Comes now the defendant and moves the court to quash Count One of the above indictment on the following grounds:

(1) The facts stated in said indictment do not constitute a public offense.

(2) Said indictment does not state the offense charged with sufficient certainty.

WHEREFORE, the defendant asks that this motion to quash the indictment be in all things sustained.

KIVETT AND KIVETT
s/ By J. L. Kivett
s/ S. C. Kivett

"Comes now the defendant and moves the Court to quash Count Two of the above indictment on the following grounds:

(1) The facts stated in said indictment do not constitute a public offense.

(2) Said indictment does not state the offense charged with sufficient certainty.

WHEREFORE, the defendant asks that this motion to quash the indictment be in all things sustained.

KIVETT AND KIVETT
s/ By J. L. Kivett
s/ S. C. Kivett
Attorney for Defendant

On October 3, 1957, appellant's Motion to Quash each count of the indictment was overruled, and on October 7, 1957, the defendant waived arraignment and plead Not Guilty. On March 26, 1958, trial was commenced and held by jury and on March 28, 1958, the evidence was heard and completed. A verdict of Guilty was returned on March 28, 1958, and the Court entered judgment as follows:

> "The defendant for the crime committed be, and hereby is, on Count 1 of the Indictment, fined in the sum of five hundred dollars ($500.00) and costs; and sentenced to the Marion County Jail for a period of six (6) months; and on Count 2 of the Indictment, fined in the sum of five hundred dollars ($500.00) and costs; and sentenced to the Marion County Jail for a period of six (6) months. Costs of this action taxed at $426.0 Surety is released."

On April 25, 1958, appellant duly, timely and properly filed his Motion for New Trial, which embraced thirty grounds and reasons, and the same was by the trial court overruled on June 17, 1958.

The appellant thereupon appealed the judgment of the trial court, the Criminal Court of Marion County, Division No. 1, to the Supreme Court of Indiana and assigned as errors therein the following Assignment of Errors, to-wit:

> "Comes now the appellant and says that there is manifest error in the proceeding and judgment of the trial court prejudical to him in that:
>
> 1. The trial court erred in overruling apellant's Motion to Quash each count of the Indictment.
>
> 2. The trial court erred in overruling appellant's Motion to Quash Count 1 of the Indictment.
>
> 3. The trial court erred in overruling appellant's Motion to Quash Count 2 of the Indictment.
>
> 4. The trial court erred in overruling appellant's Motion for a New Trial.
>
> 5. The trial court erred in overruling appellant's Motion for John L. Niblack to disqualify himself.

WHEREFORE, appellant prays that the judgment of the trial court be reversed and for all other proper relief in the premises.

/s/ Frank A. Symmes
Attorney for Appellant"

On April 18, 1960, the Supreme Court of Indiana by majority opinion affirmed the judgment of the Criminal Court of Marion County, Division No. 1, and appellant timely and properly filed a Petition for Re-Hearing, which was denied by majority opinion of the Supreme Court of Indiana on May 23, 1960, and it is from this decision and judgment that this appeal is taken, presented and prosecuted to this Court. FILING DATE EXTENDED TO FEB 6 1961 UNDER RULE 13 (1)

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The Federal questions are substantial and were timely and properly raised in the trial court by the Motion to Quash Count One and Count Two of the Indictment and the assigned and alleged failure to set out specific words in the indictment invalidated the same and thus the due process of law clause of the 14th Amendment to the Constitution of the United States and Article I, Section 13, of the Constitution of Indiana is drawn in question here.

All during the trial in the trial court appellant timely and properly raised Federal questions and the Indiana Supreme Court, in rendering its decision and judgment, did have substantial Federal questions before it. The Supreme Court of Indiana denied the Petition for Re-Hearing and passed on the Federal questions alleged in the trial court and in the Appeal and in the Petition for Re-Hearing, all three of which raised substantial Federal questions, *and therefore this Court has jurisdiction over this appeal.* The appellant has properly and timely presented and raised Federal questions on appeal to the Supreme Court of Indiana, and the Indiana Supreme Court passed on, adjudicated and ruled on the same and thus the Federal ques-

tions which appellant alleges for this appeal are substantial.

It is well settled that a statute so vague and indefinite as to permit within the scope of its language punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment to the Constitution of the United States. Winters v. New York, 333 United States 507; Stomberg v. Calif., 283, U.S. 359; Herndon v. Lowry, 301 U.S. 242.

There must be an ascertainable standard of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. Connolly v. General Construction Co., 269 U.S. 385. *Behind this rule is the requirement of fair notice of what conduct may entail punishment.*

It is well-settled that standards of certainty in statutes punishing for offenses is higher than in those depending upon civil sanction for enforcement. Pierce v. U.S., 314 U.S. 306; Cantwell v. Conn., 310 U.S. 296; Callaher v. State, 193 Ind. 629; Smithe v. State, 186 Ind. 252; Moore v. State, 183 Ind. 114; Hedderich v. State, 101 Ind. 564.

The Fifth and Sixth Amendments to the United States Constitution require that the ascertainable standard of guilt be fixed by the legislature, rather than by Courts and juries. United States v. L. Cohen Grocery, 255 US 81.

The statute must use words of determinative meaning. State v. Diamond, 27 N.M. 477, 20 ALR 1527, Annot. 70 L. Ed. 322.

Before a person can be punished, his case must be plainly and unmistakably within the statute. United States v. Resnick, 299 US 267; Donnelley v. United States, 276 US 305.

The sole question involved is whether or not the legislature spelled out the offenses with the necessary definiteness. The Indiana General Assembly has violated the 14th Amendment to the United States Constitution in that by this statute it deprives

this defendant Allison of life and liberty (or) property) without due process of law.

IT WAS ERROR TO PERMIT TESTIMONY RELATIVE TO ALLEGED CALLS WHICH OCCURRED PRIOR TO THE EFFECTIVE DATE OF THE SUBJECT STATUTE.

It is a fundamental rule of law that evidence must be logically relevant, germane and material to facts in issue in the case on trial and must tend to prove or disprove such facts; evidence as to collateral facts is not admissible. Smithe v. State, 212 Ind. 605, 10 N.E. (2nd) 899; Espenlaub v. State, 210 Ind. 687; Vorhis v. State, 233 Ind. 105.

The defendant Allison was irreparably harmed and his rights were prejudiced and jeopardized by the action of the trial court which was affirmed by the majority opinion of the Indiana Supreme Court in admitting evidence of prior legal acts to prove an illegal intent.

Appellant respectfully contends that illegal conduct can't be inferred from a legal act, and that is the specific question at bar, and the contention of the Supreme Court of Indiana in its quoting the case of Booher v. State (1926), 198 Ind. 319, which cited Rhuberg v. United States (1919), 255 Fed. 865, stating "A repetition of acts of the same character naturally indicates the same purpose in all of them; and if, when connected together, they cannot be reasonably explained without ascribing a particular motive to the perpetrator such motive will be considered as prompting each act," the Supreme Court of Indiana strayed to an erroneous precedent and, therefore, begged the essential question.

Inquiry as to arrests of a witness is improper because the law is quite clear that the prosecution in its cross-examination of the defendant is limited to inquiry concerning convictions and not merely arrests. Hawkins v. State (1941), 218 Ind. 116; Petro v. State (1933), 204 Ind. 401.

Appellant had the absolute right to cross-examine witness and the trial court erred in excusing a State's witness before the defense had finished cross-examining the witness. Appellant's right to cross-examine a witness under oath is not a rule of procedure or evidence, but is fundamental to due process and cannot, unless waived, be denied by any trier of facts, any court, or administrative tribunal. Arms v. Pierce, Gov. Co. 12, Ind. App. 566.

Appellant's counsel should have been permitted to inquire as to the residence of a witness for the prosecution. The law is well settled that while the extent of the cross-examination of a witness rests in the sound discretion of the trial court, such a rule cannot be construed to authorize the right to exclude proper cross-examination. McMullin v. Cannon (1958), Ind. App. 150 N.E. 765. Alford v. United States, 282 U.S. 687.

The Supreme Court of Indiana in addition to the preceding Federal questions which were ruled upon in its decision, had also the following additional authorities and additional citations as requested by said Court in their determination of this case.

Appellant respectfully directs the Court's attention to the following, which is glaringly apparent in its application to the statute in question—"A criminal statute which is so vague that it leaves the standard of guilt to the 'varient views of the different courts and juries which may be called on to enforce it' cannot be squared with this Provision, the Sixth Amendment to the Constitution of the United States." United States v. Potter, 56 Fed. 83, 88 (1892); Viereck v. United States, 318 US 236 (1943); Kraus Bros. v. United States, 327 US 614 (1946); U.S. v. Cohen Grocery Co., 264 F. 218 (1920); Screws v. U.S., 325 US 91 (1945).

No Indictment is sufficient if it does not allege all the ingredients which constitute the crime. Accordingly this Court has held that "The constitutional right to be informed of the nature

and cause of the accusation entitles the defendant to insist that the indictment apprise him of the crime charged with reasonable certainty that he can make his defense and protect himself after judgment against another prosecution on the same charge." U.S. v. Cruckshank, 92 US 542, (1876); U.S. v. Simmons, 96 US 360 (1878); Bartell v. U.S., 227 US 427 (1913); Burton v. U.S., 202 US 344 (1906).

The facts necessary to bring the case within the statutory definition must also be alleged. U.S. v. Carle, 105 US 611 (1882).

The Constitution of the United States in the Fourteenth Amendment thereof concerning due process of law has repeatedly provided that "A Statute so vague and indefinite in form and as interpreted--(as to fail) to give fair notice of what acts will be punished, . . . violates an accused's rights under procedural due process . . . (a penal statute must set up) ascertainable standards of guilt so that men of common intelligence are not required to guess at its meaning," either as to persons within the scope of the act or as applicable tests to ascertain guilt. Winters v. New York, 333 U.S. 507, (1948); Cline v. Frink Dairy, 274 U.S. 445 (1927); Cole v. Arkansas, 338 U.S. 345 (1949).

It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. Lawgetta v. New Jersey, 306 U.S. 451 (1939).

A law which alters the rule of evidence to permit a person to be convicted upon less or different evidence than was required when the offense was committed is invalid. Calder v. Bull, 3 Del. 386 (1798).

Article 1, Section 10, of the United States Constitution provides "No State shall pass any ex poste facto law.

CONCLUSION

It is respectfully urged that the appellant, William J. Allison did not receive a fair and impartial trial as guaranteed him by the Fourteenth Amendment to the Constitution of the United States of America, and t hat his constitutional rights were glaringly violated because:

1. The Supreme Court of Indiana by the majority opinion erroneously held that the trial court properly overruled the Motion to Quash Count One and Count Two of the Indictment.

2. The Supreme Court of Indiana erroneously held that the statute in question was constitutional .

3. The Supreme Court of Indiana erroneously held that the trial court properly overruled and denied appellant's motion requesting the Honorable John L. Niblack to disqualify himself.

4. The Supreme Court of Indiana erroneously held that the trial court properly overruled appellant's Motion for New Trial.

5. The Supreme Court of Indiana erred in denying appellant's Petition for Re-Hearing.

6. The Supreme Court of Indiana erroneously held that evidence of alleged acts by appellant before the effective date of the statute in question were properly admitted into evidence.

7. The Supreme Court of Indiana erroneously held that inquiry as to the arrests of a witness is proper.

8. The Supreme Court of Indiana erroneously held that the dismissal of a witness by the trial court over the objections of appellant's counsel before counsel had completed his cross-examination was proper and legal.

9. The Supreme Court of Indiana erroneously held that the trial court properly refused to permit inquiry by appellant's counsel of the residence of a State's witness.

The questions raised in this appeal are so substantial as to deserve plenary consideration by this Court with opportunity for briefs and a hearing on the merits.

Respectfully submitted,

WILLIAM C. ERBECKER
312 E. Washington Street
Indianapolis, Indiana
Attorney for Appellant.

FRANK A. SYMMES
CHARLES W. SYMMES
RICHARD CARDWELL
Indianapolis, Indiana
Attorneys for Appellant

EDWIN K. STEERS
Attorney General of Indiana
MERI. M. WALL
Assistant Attorney General
Attorneys for Appellee

In the Supreme Court of the United States

WILLIAM JOHN ALLISON, ALIAS WILLIAM THOMAS ALLISON,
Appellant

vs.

STATE OF INDIANA,
Appelle.

No. 29,714

APPEAL FROM THE CRIMINAL COURT OF MARION COUNTY
HON. JOHN L. NIBLACK, SPECIAL JUDGE

ARTERBURN, C.J.

The appellant was convicted upon a trial by jury on two counts charging the misdemeanor of disorderly person while using the telephone under Acts 1957, ch. 61, § 1, p. 114, being § 10-1511, Burns' 1956 Replacement. The indictment in two counts was as follows:

APPENDIX "A"

"The Grand Jury for the County of Marion in the State of Indiana, upon their oath do present that . . . WILLIAM JOHN ALLISON alias WILLIAM THOMAS ALLISON . . . on or about the 16th day of May, A.D. 1917 at and in the County of Marion and in the State of Indiana, did then and there unlawfully telephone another person, to-wit: BERNARD W. WYNN, and addressed to the said BERNARD W. WYNN lewd, lascivious and indecent words or language, the exact description of which words and language are too lewd, lascivious and indecent to be set out herein or to encumber the records of this Court, then and there being contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana.

/s/ JOHN G. TINDER
Prosecuting Attorney
Nineteenth Judicial Circuit

"Count Two:

"The Grand Jurors aforesaid, upon their oaths aforesaid, do further say and charge that WILLIAM JOHN ALLISON alias WILLIAM THOMAS ALLISON on or about the 16th day of May, A.D. 1957, at and in the County of Marion and in the State of Indiana, did then and there unlawfully telephone another person, to-wit: BERNARD W. WYNN, repeatedly for the purpose of annoying, molesting and harassing the said BERNARD W. WYNN or his family, then and there being . . . contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Indiana.

/s/ JOHN G. TINDER
Prosecuting Attorney
Nineteenth Judicial Circuit

A motion to quash was directed to both counts. (It is urged upon us that the first count of the indictment is bad for the reason that it does not set out verbatim the lewd and indecent words and lainguage used over the telephone and that the language of the statute is not sufficiently specific.) The general rule is that

a charge is sufficiently specific if it follows the wording of the statute. The apellant contends that this is one of the exceptions thereto where the statute does set out the specific acts. With this contention we cannot agree. The offense charged here is of such lewd and indecent character that the rules of the pleading with reference thereto are analogous to that in sodomy and such like crimes.

It is generally held in Indiana and other jurisdictions that a detailed description in words of acts of such lewdness and indecency is too revolting to require that the pleadings before a court be so defiled. This Court has said;

> "But by reason of the vile and degrading nature of this crime it has always been an exception to the strict rules requiring great particularity and nice certainty in criminal pleading, both at common law and where crimes are wholly statutory. It has never been the usual practice to describe the particular manner or the details of the commission of the act and where the offense is statutory a statement of it in the language of the statute, or so plainly that its nature may be easily understood, is all that is required." *Glover* v. *State* (1913, 179 Ind. 459, 461, 462, 101 N.E. 629, L.R.A., N.S. 473.

Following the above quotation is a long list of citations from other jurisdictions, going back to the time of Lord Coke in the support of such a principle.

In *Connell* v. *State* (1939), 215 Ind. 318, 19 N.E. 2d 267, the principle was again reiterated in this State.

In *Sunderman* v. *State* (1926), 197 Ind. 705, 151 N.E. 829, where a defendant was convicted of selling obscene literature, the affidavit followed the words of the statute and the obscene matter was sufficiently described as "obscene, lewd, lascivious and licentious." The court there said it was sufficient to use the language of the statute and then allege "that the obscene matter is too gross and obscene to be spread upon the records of the court."

In the case before us the indictment also says "the exact description of which words and language are too lewd, lascivious and indecent to be set out herein or to encumber the records of this Court."

There is no showing the appellant was in any way misled as to the offense charged.

The motion to quash count one of the indictment was properly overruled.

The motion to quash the second count of the indictment centers primarily about the use of the word "repeatedly" as being too indefinite and the use of the word "or" instead of the word "and" in the portion of the charge which states "that the appellant unlawfully telephoned another person, to-wit: BERNARD W. WYNN *repeatedly* for the purpose of annoying, molesting and harassing the said BERNARD W. WYNN *or* his family." (Our italics) We are not impressed with the argument that the word "repeatedly" is uncertain. Burns' § 9-1125 required that "the words used in an indictment or affidavit must be construed in their usual acceptation in common language, except words and phrases defined by law, which are to be construed according to their legal meaning."

Burns' § 9-1126 states that an indictment shall be sufficient if the offense is clearly set forth "in plain and concise language without unnecessary repetition."

Burns' § 9-1127 states that no indictment shall be quashed "For any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." Nothing is pointed out in this case whereby the defendant was prejudiced in any fashion by following the words of the statute in the indictment, namely, "repeatedly" or the disjunctive "or".

Normally, acts constituting more than one offense are connected in a statute by the disjunctive "or"; all of such offenses

may be charged in the same court by using the conjunctive "and". The proof of any one of the alleged acts is sufficient to sustain a conviction.

Marshall v. *The State* (1890), 123 Ind. 128, 23 N.E. 1141; *McGregor* v. *The State* (1860), 16 Ind. 9.

In this case two separate offenses are charged and are joined by the disjunctive "or" namely, using lewd and indecent language over the telephone or annoying a person or his family by repeated telephone calls. These two offenses have been stated in separate counts. However, the disjunctive "or" in question here occurs in the second and latter portion of the statute which constitutes a separate offense. (count 2)

The indictment in this case charges specifically that the appellant telephoned another person, "to-wit: BERNARD W. WYNN" and thereafter states in the words of the statute, "for the purpose of annoying, molesting and harassing, the said BERNARD W. WYNN or his family." The act of telephoning Bernard W. Wynn alone for the purpose alleged, defiines and limits specifically the acts.

In *The State* v. *Callahan* (1890), 124 Ind. 364, 24 N.E. 732, a similar attack was made upon an indictment which charged forgery and which alleged that the note was either destroyed "or" in the possession of another person unknown to the grand jurors. This Court held the indictment sufficiently definite and certain.

McGregor v. *The State* (1860), 16 Ind. 9.

In *Robinson* v. *State* (1953), 232 Ind. 396, 398, 112 N.E. 2d 861 we said:

> "The names of third persons who are only incidentally or collaterally connected with the offense charged against an accused need not be stated in an affidavit or indictment."

If such be the law, then to say the telephone calls were made to Bernard W. Wynn for the purpose of annoying him "or his

family" is sufficiently definite.

If one telephones another person who is specifically described by name, as in this case, for any one of the purposes set out in the latter portion of the statute in question, proof of any one of those purposes is sufficient to constitute the crime. Super-technicalities should not be indulged in where the rights of the defendant are not prejudiced thereby and he is in no way misled. Under the statutes of this State we are compelled to ignore such technical objections "which does not tend to the prejudice of the substantial rights of the defendant upon the merits."

The trial court did not err in overruling the motion to quash to the second count.

In a number of instances which can be grouped together appellant contends that the court erred in permitting certain witnesses to testify as to telephone conversations over the objection that they did not sufficiently identify the appellant. We have read this testimony and we find the witnesses stated that they recognized the appellant from his voice, with which they were familiar, and also from the fact that he stated his name. In addition, some of the witnesses stated that they either knew him prior to such telephone conversations or subsequently met him and identified the voice. The testimony of witnesses as to the identity of the appellant goes to the weight rather than to its relevancy.

The appellant further contends that the court erred in permitting some of the witnesses to testify as to telephone conversations which the appellant made to them during the year prior to the effective date of the act creating the offense (April 1, 1957.) Insofar as such testimony was admitted for the purpose of identifying the voice and the appellant, it was entirely competent. The appellant, however, contends that some of such testimony was not for the purpose of identification. The State, nevertheless, contends that such testimony was competent and relevant for the purpose of showing the intent and the pattern

of appellant's conduct, even though at the time such conduct was not criminal in nature.

In *Booher v. State* (1926), 198 Ind. 315, 153 N.E. 497, this Court held contrary to the contention of the appellant. In that case this Court stated that in a prosecution for the violation of the liquor laws of this State, prior and similar acts are competent to show an intent and the pattern of the appellant's operations, even though at the time such acts and transactions did not constitute a violation of the law. Authorities are set forth in that case amply supporting the principle stated therein.

It occurs to us that where acts of the nature involved in this case, namely, the use of lewd and indecent language over the telephone are made a crime, prior conduct of that nature which is inherently immoral and improper, even though at the time not a crime, is relevant to show a course of conduct with which the appellant is charged.

The judgment of the trial court is affirmed.

LANDIS AND ACHOR, JJ. CONCUR.
JACKSON, J. DISSENTS WITH OPINION
BOBBITT, J. NOT PARTICIPATING.

In the Supreme Court of the United States

WILLIAM JOHN ALLISON, ALIAS WILLIAM THOMAS ALLISON, *Appellant,* vs. STATE OF INDIANA, *Appellee,*	No. 29,714

DISSENTING OPINION

JACKSON, J.

I dissent from the majority opinion for the following reasons:

The statute upon which such prosecution was based, Acts 1957, ch. 61, 1, p. 114, being 10-1511, Burns' 1959 Cum. Supp., reads as follows:

> "Annoying, molesting or harassing another or indecent language by telephone calls. —Whoever telephones another person and addresses to or about such other person any lewd, lascivious or indecent words or language; or whoever telephones another person repeatedly for the purpose of annoying, molesting or harassing such other person, or his or her family, shall be deemed guilty of the misdeamnor of being a disorderly person, and, upon conviction, shall be fined in any sum not exceeding five hundred dollars ($500.00), to which may be added, imprisonment in the county jail not exceeding six (6) months; Provided, that any offenses committed by the use of a telephone as herein set out may be deemed to have been commited at either the place at which the telephone callor calls were made, or at the place where the telephone call or calls were received."

APPENDIX "B"

The indictment on which appellant was tried is set out in the majority opinion.

The sufficiency of the indictment and each count thereof was tested by motion to quash, such motion being overruled as to both counts.

Trial was had by jury resulting in a verdict of guilty on both counts, finding and judgment on each count being that appellant be fined in the sum of Five Hundred Dollars ($500.) and be imprisoned in the County Jail for a period of six months.

Appellant's assignment of errors consists of five specifications, as follows:

"1. The trial court erred in overruling appellant's Motion to Quash each count of the indictment.

"2. The trial court erred in overruling appellant's Motion to Quash Count 1 of the indictment.

"3. The trial court erred in overruling appellant's Motion to Quash Count 2 of the indictment.

"4. The trial court erred in overruling appellant's Motion for a New Trial.

"5. The trial court erred in overruling appellant's Motion for John L. Niblack to disqualify himself."

Assigned errors one, two and three will be and are considered together. Such motions are based upon the two following statutory grounds:

"1. The facts stated in said indictment does not constitute a public offense.

"2. Said indictment does not state the offense charged with sufficient certainty."

Generally it is sufficient to charge an offense in the substantial language of the statute or the equivalent thereto.

Goldstine v. *State* (1952), 230 Ind. 343, 350, 103 N.E. 2d 438;

Hitch v. *State* (1936), 210 Ind. 588, 591, 4 N.E. 2nd 184;

Such a charge will withstand a motion to quash where the statute defines the offense and enumerates the acts or omissions which constitute a crime. However, this general rule does not apply where the statute defines the crime in general terms or includes generic classifications. In such an instance the charge must be framed with particularity.

Robinson v. *State* (1953), 232 Ind. 396, 398, 112 N.E. 2d 861;

McNamara v. *State* (1932), 203 Ind. 596, 603, 181 N.E. 512;

State v. *Bridgewater* (1908), 171 Ind. 1, 4, 85 N.E. 715;

Charging a crime such as is involved herein presents certain peculiar problems due to the nature and substance of the offense. It has been held that in framing an indictment charging the publication or dissemination of obscene, lewd, or lascivious material it is sufficient to set out a general allegation of obscenity in the language of the statute with the explanation that the text of the objectionable matter is so gross as to be offense to the court.

Sunderman v. *State* (1926), 197 Ind. 705, 707, 151 N.E. 829, and cases cited therein.

These cases hold that a conclusion of obscenity charged in the generic language of the statute is sufficient to withstand a motion to quash. Underlying this particular isolated problem of charging the crime involving lewd or obscene matter there exists that basic conflict which is inherent in the whole of our law, that is public interest versus individual right. Here we have a social interest in withholding such filth and obscenity from the face of the record in the interest of public decency and judicial dignity. Opposing this interest is the right of the individual defendant to be specifically and precisely charged so that he may be fully apprised of the charges against him and make ready his defenses accordingly.

In the Sunderman case, *supra*, this basic conflict of social interest versus individual right was easily reconciled. There the

charge involved *printed matter*. The indictment was sufficient in its general references to said printed matter and the allegedly obscene publication could be preserved for subsequent presentation upon the trial of the accused. Thus the public interest in excluding the test of the obscene matter from the face of the record could be served without jeopardizing the right of the defendant to be charged with particularity.

Robinson v. *State*, *supra*, (1953), 232 Ind. 396, 398, 112 N.E. 2d 861.

In the instant case the corpus delecti of the crime consists of nothing more tangible than spoken words rather than printed or written matter. The evanescent and transitory nature of such oral utterances requires that the words themselves be set out on the face of the indictment so that the accused may be cognizant of the precise substance of the charge against him. Spoken words do not accomodate incorporation by reference as does printed matter. For this reason the indictment "must be so clear and distinct that there may be no difficulty in determining what evidence is admissible thereunder."

State v. *Bridgewater*, *supra*, (1908, 171 Ind. 1, 4, 85 N.E. 715.

We may reason by analogy from the Goldstine case, *supra*, wherein the defendant was charged with the offense of possessing "burglar tools." The opinion by Jasper, J. states that "The words 'burglar tools or implements,' as used therein, are of such a general character that they are not sufficiently certain in themselves to apprise the accused of the charge when a motion to quash is filed." It is therefore concluded that "* a substantial description of the tools is necessary to advise appellant of the crime with which he is charged." This reasoning applies with equal force to the case at hand. The generic classification of "lewd, lascivious or indecent words or language" and the definition of what conduct constitutes the offense of telephoning "another person repeatedly for the purpose of annoying, molest-

ing or harassing such other person" is no more specific and certain than the term "burglar tools or implements."

In the stant case a generic charge in the terms of the statute cannot serve to afford the accused the full measure of his rights. In such a case the public interest in withholding such obscenities from the record is necessarily subservient to the individual right of the accused to be apprised of the specific charge lodged against him.

Count one does not apprise the defendant of what he is alleged to have said, and it does not inform him of the nature of the accusation in such a manner as to enable him to prepare a defense, nor does it afford him protection against double jeopardy because it does not point out the specific facts upon which the state is basing its case. *Goldstine* v. *State*, *supra*, (1952), 230 Ind. 343, 350, 103 N.E. 2d 438.

Count two of the indictment recites that the defendant telephone " * * another person, to-wit:
BERNARD W. WYNN, repeatedly for the purpose of annoying, molesting and harassing the said BERNARD W. WYNN, or his family * * *."

The statute directed to this part recites "* * or whoever telephones another person repeatedly for the purpose of annoying, molesting or harassing such other person, or his or her family shall be deemed guilty of a misdemeanor * * *."

The motion to quash count two is also based upon the statutory grounds as set forth above, being the failure of the indictment to state a public offense, and, secondly, that the offense is not stated with sufficient certainty.

Criminal statutes must contain an ascertainable standard of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment.

Guetling v. *State* (1927), 198 Ind. 718, 726, 153 N. E. 765.

Behind this rule is the requirement of fair notice of what conduct may entail punishment.

> "To be enforceable a criminal statute must clearly and definitely define the crime so that an ordinary person may know with certainty when he is violating it * * *."
>
> *Caudill* v. *State* (1946), 224 Ind. 531, 534, 69 N.E. 2d 549.

In creating and defining a public offense, unknown at common law, the statute must be sufficiently certain to show what the Legislature intended to prohibit and punish or is will be struck down as being void for vagueness.

Smith v. *State* (1917), 186 Ind. 252, 256, 115 N.E. 943.

It is to be conceded that the statute here in question meets this minimum test of certainty and adequately conveys the Legislative intent to "a person of ordinary intelligence." The fact that the instant statute defines the offense in generic terms does not necessarily render it invalid. However, a charge drawn under this act must necessarily supply the particulars of the crime charged. A statute which defines a crime in general language may be sufficient, but an indictment framed thereunder must charge the offense with particularity. In framing a charge under such an act as is here involved, the general statutory language must be supplemented by an indictment or affidavit which either states facts sufficient to apprise the accused of the specific words or language used and the approximate time when the alleged telephone call was made, or if the charge is for repeatedly telephoning another person for the purpose of annoyance, harassment or molestation, the facts showing when such calls were made should be set out in the indictment or affidavit so that an accused cannot be indicted for one series of telephone calls and convicted on another.

A charge in the words of the staute, Acts 1957, ch. 61, 1, p. 114, being 10-1511, Burns' 1959 Cum. Supp., supra, is not alone sufficient to meet these requirements.

I am also in utter disagrement with the statement in the majority opinion that "* * * prior and similar acts are competent to show an intent and the pattern of the appellant's operations, even though at the time such acts and transactions did not constitute a violation of the law. * * * It occurs to us that where acts of the nature involved in this case, namely, the use of lewd and indecent language over the telephone are made a crime, prior conduct of that nature which is inherently immoral an improper, even though at the time not a crime, it relevant to show a course of conduct with which the appellant is charged."

The defendant is not charged with "a course of conduct," he is charged with the commission of a crime. A staute of 1852, not repealed, declared that all "Crimes and misdemeanors shall be defined and punishment therefor fixed by stautes of this state and not otherwise." 1 R.S. 1852, ch. 61, 2, p. 351, being 9-2401 Burns' 1956 Replacement. The language of the majority opinion implies that a criminal intent may be inferred from the commission of an act not in itself a crime. Such, I submit, is not the law in Indiana, nor should it be. The case relied upon in the majority opinion, *Booher* v. *State* (1926), 198 Ind. 315, 153 N.E. 497, was a prosecution for a conspiracy to transport liquor in an automobile, it is not in point, nor applicable here, for the reason that it dealt with a conspiracy and a different rule of law would apply.

The judgment of the trial court should be reversed with instructions to sustain appellant's motion to quash the indictment and each count hereof.

STATE OF INDIANA
CLERK OF SUPREME AND
APPELLATE COURTS
Alice C. Whitecotton, Clerk
217 State House

Indianapolis 4
Telephone Melrose 4-3129

WILLIAM J. ALLISON
vs.
THE STATE OF INDIANA
No. 29, 714

You are hereby notified that the Supreme Court has on this day denied Appellant's Petition for Re-Hearing.

ARTERBURN, C. J.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court.
this 23rd day of May, 1960

/s/ Alice C. Whitecotton By M. Kruse
Clerk Supreme and Appellate Courts

Return this portion.
I hereby acknowledge receipt of the above notice.
_____, 1960

May 23
No. 29, 714

_____
Attorney for _____

cc: Frank A. Symmes, Indianapolis
Edwin K. Steers, Attorney General, Indianapolis

APPENDIX "C"